



July 30, 2020

Joe Canary
Office of Regulations and Interpretations Employee Benefits Security
Administration Room N-5655 U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Financial Factors in Selecting Plan Investments Proposed Regulation (RIN 1210-AB95)

MARY KAY HENRY
International President

GERRY HUDSON
International Secretary-Treasurer

NEAL BISNO
Executive Vice President

LUISA BLUE
Executive Vice President

HEATHER CONROY
Executive Vice President

LESLIE FRANE
Executive Vice President

VALARIE LONG
Executive Vice President

ROCIO SÁENZ
Executive Vice President

Dear Director Canary:

On behalf of the Service Employees International Union (SEIU), I am writing to provide comments on the U.S. Department of Labor's proposed rulemaking entitled "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95) (the "Proposed Rule"). If adopted, the Proposed Rule will create unnecessary and burdensome regulations that will discourage retirement plans from making prudent investments that generate collateral benefits for communities and economic growth for working people.

SEIU Members participate in private-sector defined benefit and defined contribution retirement plans that will be affected by the Proposed Rule. Many of these retirement plans have a long history of making prudent, job creating investments that create collateral benefits for communities while at the same time generating competitive, risk-adjusted returns to pay promised retirement benefits.

The Proposed Rule was published in the Federal Register on June 30, 2020, permitting a brief 30-day comment period that was inadequate in length. Executive Orders 12866 and 13563 state, "To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." Given the significance of the Proposed Rule, we reiterate our June 30, 2020 request that the comment period be extended to 120 days.

The Proposed Rule is unnecessary and would be counterproductive. The Department points only to speculation to support its rationale for the Proposed Rule and offers no evidence that fiduciaries have subordinated the interests of plan participants and beneficiaries. Moreover, the Department acknowledges the imprecision of the key term in the Proposed Rule, what it calls "ESG investing," but then proceeds to propose a vague rule without even attempting to better define the investments that it is seeking to prohibit. Finally, the Proposed Rule overestimates the benefits and underestimates the costs that it will impose on retirement plans and their participants.

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¹ Executive Order 12866, 58 FR 51735, October 4, 1993, and Executive Order 13563, 76 FR 3821, January 21, 2011.

We respectfully request that the Department withdraw the Proposed Rule and allow the current, subregulatory guidance (Interpretive Bulletin 2015-01) to remain in place. In the alternative, the Department should withdraw the Proposed Rule until it has had an opportunity to correct the deficiencies described herein, after which it should re-propose a rule and provide sufficient time for comment thereon, including a public hearing and a post-hearing comment period.

Since the passage of ERISA, the Department has encouraged plan fiduciaries to adopt prudent procedures for investment decisions rather than attempt to proscribe specific investment outcomes.³¹ In many ways, the Proposed Rule's express QDIA prohibition of ESG funds is a throwback to the statutory "legal lists" of authorized investments that historically regulated trust investments before ERISA formally enacted the modern prudent expert rule for selecting investments.³² Rather than seek to discourage ESG investing, the Department should simply hold ESG investments to the same fiduciary standards that apply to all investments.

The Proposed Rule seeks to correct imaginary problems, the existence of which the Department has provided no data to support, and the Proposed Rule itself creates real problems that do not currently exist. Among the problems created by the Proposed Rule are increased and unnecessary liability for fiduciaries, significant confusion on how to comply with the Proposed Rule, and reduced investment options for plan participants and beneficiaries, including elimination of a large swath of high-performing ESG investments. Such an outcome will harm the retirement security of working people that it is the mission of the Department's Employee Benefits Security Administration to protect.

We therefore respectfully request that the Department withdraw the Proposed Rule in its entirety. In the alternative, the Department should revise the Proposed Rule and invite additional comment. We also request that the Department schedule a public hearing on the Proposed Rule, to be conducted virtually to follow COVID-19 public health guidelines. As is customary for Department rulemakings, the hearing should be accompanied by the opportunity for the submission of post-hearing comments by participants and observers. Accordingly, the comment period on the Proposed Rule should be held open after the hearing.

Sincerely,

Renaye Manley